



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**ELECTION PETITION APPEAL NO. 1 OF 2018**

1. GEOFFREY GITHINJI MWANGI
2. WINROSE NYAGUTHII MWANGI
3. THOMAS GICHARA KINGORI.....APPELLANTS

**VERSUS**

1. JUBILEE PARTY
2. THE INDEPENDENT ELECTORAL & BOUNDERIES COMMISSION
3. THE CLERK COUNTY ASSEMBLY OF LAIKIPIA..... RESPONDENTS

**AND**

1. CATHERYN NYAWERA MATHENGE
2. ZAMZAM SALMA HUSSEIN
3. CHRISTOPHER MARK SAID
4. PETER LEMERIAN MATUNGE
5. JUDY WANJIKU ISHUMAEL LUKIO
6. IRENE WACHUKA JOHN
7. PATRICIA MUTHONI WAWERU
8. MARY SAMKEN KESHINE
9. CATHERINE NYOKABI KABUE.....INTERESTED PARTIES

**J U D G M E N T**

1. This is an appeal from the order of the election court below (*L Mutai, CM*, as designated by the Chief Justice) in *Nanyuki CM Election Petition No 1 of 2017* dated 3<sup>rd</sup> January 2018 by which the petition was struck out with costs. Decree was subsequently issued on 09/01/2018.

2. The Petitioners (who are the Appellants herein) sought in their petition five main reliefs as follows:-

“1. ....

2. A declaration that the Jubilee party list contained in Gazette Notice No 3380 dated 28<sup>th</sup> August 2017 published by the 2<sup>nd</sup>

**Respondent for the nominees for minorities and the marginalized to the Laikipia County Assembly does not effect or reflect ethnic diversity and regional balance, (and) persons living with disabilities in Laikipia County, and is therefore invalid and null and void.**

**3. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to prepare, constitute and gazette another party list that reflects ethnic diversity, regional balance and persons living with disabilities and the marginalize in Laikipia County, and further that the same should strictly contain the names of the registered voters in Laikipia County.**

**4. An order compelling the 1<sup>st</sup> Respondent to nominate in its party list a person to represent people living with disability within Laikipia County.**

**5. The 2<sup>nd</sup> Respondent to expeditiously gazette the freshly constituted party list by the 1<sup>st</sup> Respondent and forward the same to the 3<sup>rd</sup> Respondent for implementation and swearing in.**

**6. Costs of the petition.”**

3. The petition was struck out upon -

(a) A preliminary objection raised by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Interested Parties by notice dated 07/12/2017.

(b) An application by the 8<sup>th</sup> Interested Party by notice of motion dated 07/12/2017.

4. Two legal issues were stated in the notice of preliminary objection:-

(i) That the affidavit dated 04/09/2017 sworn in support of the petition was defective in that it was a joint affidavit “which is against clear provisions of the law”.

(ii) That the said affidavit was “fatally and incurably defective in law and as such cannot stand or be ventilated before this...court, and the petition...is (thus) not supported by an affidavit as required by law and should be dismissed with costs”.

5. The notice of motion dated 04/12/2017 also raised two issues as follows -

(i) That the affidavit sworn in support of the petition was incompetent for being a joint affidavit.

(ii) That the petition was thus incompetent.

6. The first legal issue raised in both the notice of preliminary objection and the application to strike out the petition was clear enough. What was being challenged was the competency of the affidavit sworn in support of the petition upon the ground that it was a joint affidavit. That ground was overruled by the election court, and for good reason. Under the law an affidavit can be singular or plural as long as it is in the first person. In other words, the affidavit can be by one person or be a joint one by several persons.

7. The second legal issue raised in both the notice of preliminary objection and the application to strike out was not clear at all. However, it emerged from both the written and oral submissions of the parties before the election court that what was being challenged was the competency of the affidavit sworn in support of the petition upon the ground that it was not commissioned as provided for in law, and ought to be struck out. The ancillary legal point was what should happen to the petition in the event that the supporting affidavit was struck out.

8. The election court found favour in the argument that the supporting affidavit was not commissioned as provided by law and was thus fatally defective, and struck it out. The court also found that the result of such striking out was that the petition was not supported by affidavit as required by law and was equally incompetent.

9. 5 grounds of appeal were raised in the memorandum of appeal dated and filed on 04/01/2018. At the commencement of highlighting of the parties' written submissions, learned counsel for the Appellants informed the court that the Appellants were abandoning grounds 1, 4, and 5 and would urge only grounds 2 and 3. He invited the court to disregard the written submissions in regard to the abandoned grounds. He also pointed out that grounds 2 and 3 had been argued together in the Appellant's written submissions.

10. Grounds 2 and 3 are as follows as they appear in the memorandum of appeal:-

“1. ....

2. That the (election court) misdirected (itself) by striking out the petition dated 04/09/2017 and supporting affidavit sworn by the appellants...contrary to the ratio of Hon Justice Jesse Nyaga in *Kakamega High Court Election Petition No 9 of 2017 – David Wamatsi Omusotsi – vs- Returning Officer Mumias East Constituency & 2 others (2017) eKLR* delivered on 02/11/2017.

3. That the (election court) misdirected (itself) by striking out the petition...and supporting affidavit... solely on (the) purported ground that the same was defective and contrary to the provisions of the *Oaths and Statutory*

*Declarations Act (Cap 15)....*

4. ....

5. ....”

11. I have considered the submissions, both written and oral, of the parties as ably presented by their learned counsels.

12. The legal issues raised in this appeal (grounds 2 and 3 in the memorandum of appeal), as I see them, are as follows -

**(a) Whether the affidavit sworn and filed in support of the petition was commissioned as required by the *Oaths and Statutory Declarations Act, Cap 15*.**

**(b) If it was not so commissioned, whether such defect rendered it incurably defective.**

**(c) If the affidavit was incurably defective, what effect in law this would have on the petition.**

13. These three were in essence the issues raised in the second

limb of the notice of preliminary objection and the application for striking out. The issues, among others, were canvassed fully in both written and oral submissions before the election court. They were in essence the issues canvassed before this court as well.

**Whether the affidavit sworn and filed in support of the petition was commissioned as required by the *Oaths and Statutory Declarations Act, Cap 15*.**

14. Section 2 of the *Oaths and Statutory Declarations Act* provides for appointment of commissioners for oaths. It states in subsection (1) thereof -

***“(1) The Chief Justice may, by commission signed by him, appoint persons being practising advocates to be commissioners for oaths, and may revoke any such appointment.”***

Section 3 of the Act provides -

***“3. Every advocate appointed a commissioner for oaths shall, on appointment sign a roll, which shall be kept by the Registrar of the High Court.”***

15. Section 4 of the Act sets out the powers of a commissioner for

oaths. Subsection (1) thereof states -

***“(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognise in or for the purpose of any civil proceedings in the High Court or any subordinate court.***

***Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceedings or matter in which he is the advocate for any of the parties to the proceedings or concerned in the matter, or clerk to any such advocate, or in which he is interested.”***

16. From the above quoted provisions of statute, it is clear that a commissioner for oaths can only be a practicing advocate who has been duly appointed by the Chief Justice as such. Any affidavit taken by such commissioner for oaths would be expected to show on the face thereof the identity of the commissioner.

17. The affidavit in issue in this appeal is at pages 19 to 25 of the record of appeal. The oath on the affidavit is at page 24. On the space provided for the commissioner for oaths to sign there is a signature. But there is no name of the commissioner for oaths taking the affidavit. Instead there is rubber stamp impression with the words -

**“BWONWONGA & CO ADVOCATES**

**& COMMISSIONER FOR OATHS**

**P.O. BOX 894-10400 NANYUKI.”**

There is no name of the commissioner for oaths who took the affidavit to authenticate the signature appearing thereon.

18. As we have already seen in the relevant provisions of the *Oaths and Statutory Declarations Act*, the Chief Justice will appoint as commissioners individual advocates in practice, not their firms. Such commission is personal to the particular advocate so appointed. The commission is not issued to his firm. An affidavit therefor ought to show that it was taken by an individual advocate and commissioner for oaths, not by a firm of advocates. If affidavits were to be taken by a firm of advocates, what would prevent any member of that firm, be they advocates who have not been appointed commissioners for oaths, or clerks and secretaries, from purporting to take affidavits on behalf of such firm? That would clearly be against the clear provisions of the *Oaths and Statutory Declarations Act*.

19. This is in line with one of the holdings in the case mentioned by the Appellants in ground 2 of their appeal. That case is *David Wamatsi Omusotsi – vs – The Returning Officer Mumias East Constituency & 2 others, High Court Kakamega Election Petition No. 9 of 2017 [2017] eKLR*. In that case Jesse Njagi, J held *inter alia* –

**“It is clear from the provisions of the said Act that affidavits cannot be commissioned by a firm of advocates as happened in this case. An affidavit can only be commissioned by a commissioner for oaths and other officials of the court allowed to do so under the Act...”**

I entirely and respectfully agree with that that holding.

20. The issue therefore was whether, on the face of the document itself, the affidavit in issue was taken by a commissioner for oaths, duly appointed. It clearly was not. The affidavit showed on the face of it that it was taken by **Bwonwonga & Co Advocates & Commissioner for Oaths**, not by any *Bwonwonga, Advocate* who could well have been a duly appointed commissioner for oaths. Bwonwonga & Co Advocates could not have been appointed commissioner for oaths under section 2(1) of the Act. Such appointment could only be of an advocate in practice, not a firm of advocates.

21. Contrary to what was submitted for the Appellants, the issue whether the affidavit was duly taken by a commissioner for oaths was an issue of law, not fact. It was not open to the election court to call any advocate to verify that he or she was the advocate and commissioner for oaths behind the rubber stamp impression and that the signature thereon was his or hers. The affidavit itself ought to have clearly shown on the face of it who the advocate and commissioner for oaths taking the affidavit was. The purported knowledge of the election court of a Mr. Bwonwonga who was said to be a commissioner for oaths was irrelevant.

22. The point of law raised regarding whether the affidavit in issue was properly sworn before a commissioner for oaths was thus a pure point of law based on statute. The election court did not err in law in any way in finding that the affidavit in question was not taken by a commissioner for oaths as provided for in the statute.

**If the supporting affidavit was not duly commissioned as by law provided, whether such defect rendered it incurably defective**

23. The supporting affidavit fell afoul of clear provisions of statute. These provisions were not merely procedural technicalities. They were substantive provisions regarding who, in law, can take affidavits and administer oaths. Oaths and affidavits are very serious affairs. The provisions of the *Oaths and Statutory Declarations Act* are designed to ensure that only authorised persons administer oaths and take oaths and declarations.

24. The defects in the supporting affidavit thus rendered it incurably defective. Such defects were not amenable to saving under **Article 159** of the *Constitution* as they were not procedural technicalities. The affidavit had to be struck out, and the election court did not err in law in striking it out.

**The supporting affidavit having been struck out for being incurably defective, what was the effect of that on the petition?**

25. The supporting affidavit having been struck out, the petition had, in effect, been filed without a supporting affidavit as required in mandatory terms by Rule 8 (4) (b) of the *Election Petition Rules*.

26. In the case of *Dickson Mwenda Githinji –vs- Gatirau Peter Munya & 2 others [2014]eKLR* the *Court of Appeal* held that the filing of an affidavit in support of an election petition is a mandatory requirement. The petition in this case, in effect, having been filed without a supporting affidavit, was incompetent, and the election court did not commit any error of law in so holding and in striking out the petition.

27. The upshot is that this appeal has no merit. It is hereby dismissed with costs to the Respondents and the Interested Parties. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 28<sup>TH</sup> DAY OF JUNE 2018**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 28<sup>TH</sup> DAY OF JUNE 2018**